No. 80-1068

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - Petitioner,

versus

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC. - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the court of appeals correct in holding that in order to employ a theory of vertical conspiracy to avoid summary judgment under the indirect purchaser doctrine of *Illinois Brick*, the indirect purchaser in a price-fixing action against remote sellers must specifically plead a vertical conspiracy between the remote sellers and the non-party middlemen and may not merely rely on a pleading of horizontal conspiracy among remote sellers and an allegation that there are or may be unspecified, unnamed co-conspirators who are engaged in the same business as remote sellers (Pet., App. D, 24a-25a)?

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v.

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC. - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

This brief is submitted on behalf of Respondents Stewart Mechanical Enterprises, Inc. ("Stewart"), and James E. Smith & Sons, Inc. ("Smith"), by counsel, in opposition to the petition of Jewish Hospital Association of Louisville, Kentucky, Inc. ("Hospital") for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. In this action for price-fixing under Section 1 of the Sherman Act, 15 U.S.C. §1, the court of appeals' decision affirms the district court's summary judgment for Stewart and Smith, remote sellers to the Hospital, based on the indirect pur-

chaser doctrine of *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977). The Hospital seeks review of only that portion of the court of appeals' decision, part II, C, which holds that absent specific allegations of a vertical conspiracy between the remote sellers and the middlemen, the court need not consider the existence or scope of a "vertical conspiracy" exception to *Illinois Brick* (Pet., App. D, 24a-25a).

Far from presenting this Court with an issue "important to the development in the law of the private enforcement of anti-trust claims and a necessary implementation of the *Illinois Brick* decision" (Pet. 7), the Hospital is merely requesting another appellate review of a well-reasoned holding that the Hospital did not properly or adequately raise the vertical conspiracy issue in its pleadings.

Based upon the record in this case, and upon the lack of proper pleading by the Hospital, the conclusion of the district court as affirmed by the court of appeals was wholly predictable and is consistent with all applicable authority. The Hospital's protestations to the contrary notwithstanding (Pet. 7), the court of appeals' holding will not frustrate any legitimate private antitrust action sanctioned by *Illinois Brick* and conducted within the norms of pleading set forth in the Federal Rules of Civil Procedure. The Hospital has failed to demonstrate any justification for certiorari, and the petition should be denied.

STATEMENT

Set forth here are the undisputed facts material to the consideration of the question presented.[1]

I. The Bidding and Contracting for the Construction of the Wheeler Addition to the Hospital.

In 1970 the Hospital solicited bids from general contractors for the construction of a major improvement to its existing facility. This improvement became known as the Wheeler Addition (Complaint, p. 3). Pursuant to the bidding procedure established by the Hospital, several interested general contractors submitted to the Hospital's architects the names of subcontractors in various trades from which they wished to seek subbids. The subbids to be sought from the mechanical contractors were to cover the plumbing, heating, air conditioning and sheet metal services and supplies needed for the construction of the addition. The architects compiled a master list of "approved" subcontractors including the names of nine mechanical contractors, all submitted by the general contractors. Stewart and Smith were among those recommended by one or more general contractors, approved by the archi-

[1]Like the Hospital (Pet. 4), Stewart and Smith accept and commend to the Court the statement of this case contained in the opinion of the court of appeals (Pet., App. D, 12a-15a). Inasmuch as the Hospital limits its petition to the "vertical conspiracy issue" (Pet. 4), this brief will focus on the facts material to that issue and will omit facts material only to the Hospital's abandoned claims (i) that the middlemen were either controlled purchasers or sellers, and (ii) that there was a pre-existing cost-plus contract between the Hospital and the middlemen.

tects and, therefore, solicited by the bidding general contractors (Dep. of Alfred S. Joseph, Jr., pp. 48, 55-58; Letter dated April 17, 1970 from Joseph to Wilhelm with list of approved subcontractors — Exhibits H and L, respectively, to Aff'd. of Alan N. Linker, July 18, 1977).

In May, 1970 both Stewart and Smith submitted mechanical contracting bids to various general contractors who had solicited bids from them. Neither Stewart nor Smith submitted bids to the Hospital. (Aff'd. of George Duthie, July 5, 1977, and Aff'd. of James E. Smith, Jr., July 1, 1977, in Support of Motion for Summary Judgment). Five general contractors then submitted bids to the hospital for the construction of the entire project. These bids included amounts for the mechanical contracting work.[2]

The low bidder among the five general contractors was Wilhelm Construction Company of Indianapolis, Indiana ("Wilhelm") with a bid of $11,843,661. After negotiations between the Hospital and Wilhelm

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[2]On a separate portion of the bid documents set aside by the architect for accounting purposes only, three of the five general contractors listed differing approximate budget amounts to be charged for mechanical contracting services and supplies. The actual mechanical contracting costs to be charged to the Hospital by the general contractors were included and interspersed throughout all sections of the general contractors' bids, and there was no specific accounting for the exact amount represented thereby or for the exact amount which any general might pay to any mechanical contractor for these supplies and services (Tabulation of Bids, Jewish Hospital Additions; Bid Form of F. A. Wilhelm Construction Co.—Exhibits C and B, respectively, to Aff'd. of Alan N. Linker, July 18, 1977).

relating to the selection of alternates to be included in the bid and to the overall price to be charged by Wilhelm to the Hospital, those two parties entered into a construction contract at the firm price of $10,537,637 plus or minus amounts to be added or subtracted because of any changes in the work that might be later agreed upon between the Hospital and Wilhelm. (Dep. of Alfred S. Joseph, Jr., pp. 80-84 — Exhibit O to Aff'd. of Alan N. Linker, July 18, 1977; Aff'd. of Alan N. Linker, March 6, 1978, and attached payment records of the Hospital). Wilhelm thereafter subcontracted the mechanical construction work to Stewart (Aff'd. of George Duthie, July 5, 1977, in Support of Motion for Summary Judgment).

II. The Government's Separate Horizontal Price-Fixing Conspiracy Actions Against the General Contractors and the Mechanical Contractors.

On May 22, 1972, Smith and other mechanical contractors were indicted for horizontal price-fixing in the Louisville area. *United States* v. *Clark Mechanical Enterprises, et al.,* Criminal No. 27837 (W.D. Ky.). The United States also filed a concurrent civil action, *United States* v. *Clark Mechanical Enterprises,* Civil No. 7264-A (W.D. Ky.). Although not named a defendant, Stewart was made an unindicted co-conspirator in a bill of particulars filed in the criminal action. The criminal action ended with *nolo contendere* pleas by all defendants, the last of whom were sentenced on February 16, 1973, and the civil action resulted in a consent judgment entered on September 13, 1973.

On November 18, 1975, the United States commenced against Stewart concurrent criminal and civil actions for horizontal price-fixing with other mechanical contractors. *United States* v. *Stewart Mechanical Contractors, Inc.,* Criminal No. CR75-0265L, Civil No. 75-0377L(A) (W.D. Ky.). The same month the United States commenced similar cases for horizontal price-fixing against certain general contractors in the Louisville area. *United States* v. *Whittenberg Engineering & Construction Co.,* Criminal and Civil Nos. CR75-0266L and C75-0380L(A) (W.D. Ky.). On March 8, 1976, the United States filed bills of particulars in each of the two unrelated criminal cases, stating that there had been both a horizontal general contractors' conspiracy and a horizontal mechanical contractors' conspiracy. The bill of particulars in the general contractors' case identified the Wheeler Addition, among other projects, as one on which the general contractors were alleged to have fixed prices. (Hospital's Memorandum in Opposition to Defendants' Additional (Third) Motion for Summary Judgment, p. 3). These civil and criminal cases commenced in 1975 against Stewart and against the general contractors were concluded with *nolo contendere* pleas and final consent judgments.

Neither the indictments, the complaints, the bills of particulars nor any of the other records in any of these government cases nor any other private action have alleged or supported the existence of any vertical price-fixing conspiracy among any general contractors and any mechanical contractors in the Louisville area.

III. The Hospital's Separate Horizontal Price-Fixing Actions Against the General Contractors and the Mechanical Contractors.

Based on the separate government cases against the general and mechanical contractors, the Hospital commenced two separate treble damage actions in September 1976. In addition to this action, the Hospital also filed *Jewish Hospital Ass'n.* v. *Struck, Inc.*, Civil No. C-76-0426-L(4) (W.D. Ky.). (Complaint, Appendix A to Aff'd. of Irwin G. Waterman, January 24, 1978). In that case, the Hospital named Wilhelm and three of the four other bidders for the general contract as defendants and principals in a horizontal price-fixing conspiracy. In the instant case the Hospital named Stewart and Smith as defendants. Each complaint was paraphrased from and was substantially identical to the government's indictment of the respective building trades. Each complaint alleged the existence of co-conspirators unnamed as defendants (Pet. 6), but neither made any mention of a vertical conspiracy as such. The complaint in this action stated that the co-conspirators were "engaged in the business of providing mechanical contracting supplies and services." (Complaint, p. 2; Pet. 6)[3]

[3]In this case the Hospital did not sue any of the other seven "approved" mechanical contractors which, under the Hospital's apparent theory of price-fixing among the mechanicals, would have had to agree not to bid before any such scheme would have had any chance of success. Nor in *Jewish Hospital* v. *Struck* did the Hospital sue Turner Construction Co., Inc., the high bidder among the general contractors. It was logical to assume that these were unnamed co-conspirators.

Stewart and Smith answered and denied the operative allegations of the complaint. They also raised as a defense the four-year statute of limitations contained in 15 U.S.C. §15b. After this Court's decision on June 9, 1977 in *Illinois Brick,* Stewart and Smith moved for summary judgment on the ground that the Hospital was barred from recovering damages from Smith and Stewart, from which the Hospital was an indirect purchaser. The Hospital had by that time taken the deposition testimony of the chief executive officer of one of the unsuccessful general contractors which was a defendant in the Hospital's other action against the general contractors. The examination was exhaustive but the deposition developed no leads to any vertical conspiracy, nor, for that matter, any evidence of an agreement among the general contractors. Both sides relied upon portions of that testimony on the motion for summary judgment.

While the Court was considering the motion for summary judgment, the Hospital moved to consolidate its two horizontal conspiracy actions against the general and mechanical contractors. Noting in its motion that both cases arose out of the same construction project and that only Stewart and Smith among the nine "approved" mechanical contractors submitted bids to any of the general contractors bidding on the project, the Hospital through its counsel, added the following innuendo:

> Any general contractor having knowledge or having reason to know there was not sufficient compe-

> tition for the mechanical subcontract work on the project and which included such bids in the total of its general contract bid participated in the alleged wrongful actions of the Defendants herein. (Motion to Consolidate, p. 3, July 19, 1977).

On November 2, 1977, in light of the pendency of certain proposed legislation designed to nullify the *Illinois Brick* decision, the district court remanded the motion for summary judgment with leave to renew it if Congress had not enacted such legislation on or before January 2, 1978. In the exercise of its discretion, the district court at the same time denied the motion to consolidate with leave to renew in the event the legislation were enacted.

On January, 3, 1978, no legislation overruling *Illinois Brick* having been passed, Stewart and Smith renewed their motion for summary judgment. Again, the Hospital resisted, filing an opposing memorandum and documents; however, the Hospital continued to eschew discovery regarding a vertical conspiracy and failed to plead such facts as were necessary to allege a vertical conspiracy.

Meanwhile, discovery was proceeding in the Hospital's action against the general contractors. Responding to interrogatories in that action, the Hospital stated that it had found material in its own files and in the files of its architects in connection with the case against the mechanical contractors which indicated that at the time of the bidding the general contractors should have been on notice of "insufficient competi-

tion" among the mechanical contractors. Again, the Hospital intimated that there may have been a vertical conspiracy between the mechanical and general contractors. (Plaintiff's Supplementary Response to Defendant Glenroy's First Set of Interrogatories filed February 10, 1978, in *Jewish Hospital Ass'n.* v. *Struck* and filed as exhibit in this case in support of Defendants' Motion for Summary Judgment on statute of limitations grounds, February 21, 1978).

Thus the Hospital admitted that its own records and those of its architects contained, at the time of the bidding and well within the four-year limitations period, the very information upon which the Hospital now seemed to rely for its claims against Stewart and Smith. For this reason, on February 21, 1978, Stewart and Smith moved for summary judgment against the Hospital on the ground that the statute of limitations had run while the Hospital possessed the knowledge of its claim and before the complaint had been filed. The Hospital resisted this motion as well.

Finally, on May 4, 1978, the district court filed its memorandum opinion (Pet., App. A, 1a-9a) and entered an order of summary judgment (Pet., App. B, 10a). On May 25, 1978, the trial court entered a supplemental order of summary judgment (Pet., App. C, 11a) to clarify and show that the only ground of its original judgment had been the indirect purchaser doctrine of *Illinois Brick* and to show clearly that the court had denied the motion under the statute of limitations. The Hospital appealed to the Sixth Circuit, and Stewart and Smith cross-appealed from the district court's re-

fusal to grant summary judgment on the ground of the statute of limitations. The Sixth Circuit affirmed on the *Illinois Brick* ground without reaching the statute of limitations issue (Pet., App. D. 13a).

At no time after the filing of Stewart's and Smith's original motion for summary judgment in July 1977, despite taking discovery in its case against the general contractors, did the Hospital seek to take discovery of Stewart, Smith or anyone else in the instant case relating to the "vertical conspiracy issue." Neither in response to the summary judgment motion did the Hospital indicate to the district court pursuant to Rule 56(f) of the Federal Rules of Civil Procedure that it was unable to obtain such facts as were needed to oppose the motion. Nor did the Hospital seek to amend its pleadings in this action to plead a vertical conspiracy, either with or without the addition of one or more of the general contractors as parties. The Hospital stubbornly relied on its horizontal conspiracy pleading and its pleading of the existence of unnamed co-conspirators "engaged in the business of providing mechanical contracting supplies and services" (Complaint, p. 2; Pet. 6).

SUMMARY OF ARGUMENT

The decision of this Court in *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977), governs this case. The construction contract bidding format examined in *Illinois Brick* is functionally identical to that revealed in the record here.

The court of appeals' affirmance of summary judgment for Stewart and Smith on the basis of the indirect purchaser doctrine is in accord with the decisions of various district courts and courts of appeals that under appropriate facts and pleadings there may be a third exception to *Illinois Brick* where there is a vertical price-fixing conspiracy and the plaintiff buys directly from one of the conspirators.

This is a case of inadequate pleading. The court of appeals held that in order to raise a "vertical conspiracy" exception to *Illinois Brick* doctrine, a plaintiff must first specifically plead the existence of a vertical conspiracy and that the plaintiff purchased from one of the members of the conspiracy. The court of appeals also held that the Hospital could not rely for this purpose on a mere pleading of horizontal conspiracy and an allegation of the existence of unnamed and unidentified co-conspirators. The court of appeals rejected the Hospital's attempt to make the defendants in one of its horizontal conspiracy cases defendants in another of its horizontal conspiracy cases by moving to consolidate the two under Rule 41 of the Federal Rules of Civil Procedure.

The court of appeals' holding is entirely consistent with the holding and rationale in *Illinois Brick* and with the holdings of the Fifth, Seventh and Ninth Circuits and the district court authority inexplicably relied upon by the Hospital. Moreover, upon remand, the court of appeals would have a separate basis for affirming the summary judgment because the complaint

was filed outside the limitations period prescribed by statute.

REASONS FOR DENYING THE WRIT

Both factually and procedurally this case is functionally identical to *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977). The multitiered construction bidding mechanism employed by the owners, contractors and suppliers in the *Illinois Brick* case is the same one under which the construction of the Hospital's Wheeler Addition was bid. Where the plaintiff is at least one tier removed from the defendants, a treble damage action arising from the alleged illegal manipulation of this system will inevitably raise the specter of the "insurmountable" task of proving with some certainty the impact of an overcharge passed through the chain of distribution. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 494 (1968).

While *Hanover Shoe* forbids the use of the pass-on defense, *Illinois Brick* bars the offensive use of pass-on proof with two very narrow exceptions. The first exception, previously noted in *Hanover Shoe,* 392 U. S. at 494, may apply where the indirect purchaser has a pre-existing cost-plus contract with the middleman, thus eliminating the need for proof of complex market phenomena to show the amount of any pass-on. 431 U. S. at 735-36. The second possible exception raised by this Court in *Illinois Brick* might involve a direct purchaser controlled by its customer. 431 U. S. at 736 n. 16. Citing *Perkins* v. *Standard Oil Co.,* 395 U. S.

642, 648 (1969), and *In re Western Liquid Asphalt Cases,* 487 F. 2d 191, 197, 199 (9th Cir. 1973), *cert. denied,* 415 U. S. 919 (1974), this Court indicated this narrow exception might apply in situations of stock ownership or other actual control through financial arrangements.

The narrow breadth given to the exceptions is consistent with the two reasons the Court gave for its holding in *Illinois Brick* — the complexity of proof and the possibility of multiple, inconsistent and overlapping claims. 431 U. S. at 735-36. The touchstone for application of the exceptions is a determination that the market or pricing mechanism involved in the case eliminates the complexities otherwise inherent in the proof of passing on of price components and substantially eliminates the possibility that the middleman might actually have a claim against the remote seller.

When *Illinois Brick* was decided and Stewart and Smith moved for summary judgment in this case, the Hospital responded by indiscriminately raising every conceivable exception or avoidance of the indirect purchaser doctrine. All were rejected by the district court (Pet., App. A, 8a) and by the court of appeals (Pet., App. D, 18a-25a).

Having dropped for purposes of its petition its claims to the two exceptions recognized in *Illinois Brick,* the Hospital has focused here on what it has

termed the "vertical conspiracy issue" (Pet. 4).[4] The Hospital has admittedly never specifically pleaded a vertical conspiracy (Pet. 4), and Stewart and Smith submit that there never has been in this case any issue of "vertical conspiracy."

I. The Decision of the Court of Appeals Raises No Dispute or Conflict As to the Existence, in a Proper Case, of a "Vertical Conspiracy" Exception to the Indirect Purchaser Doctrine.

The Hospital asks this Court to establish or recognize a new exception to the indirect purchaser doctrine of *Illinois Brick*. Apparently such exception would be designed to allow a plaintiff to recover overcharges from remote sellers with whom the middleman was involved in a vertical price-fixing conspiracy or in a resale price maintenance scheme. In such a case, however, there would be no proof of pass-on because the plaintiff would be proving only the overcharge contained in the last price charged directly to him by a middleman.

We are not aware of any court having decided precisely the issue sought to be raised by the Hospital in this case, *i.e.* as stated by the court of appeals, "whether proof of knowledge [by the middleman of a

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[4] As noted *infra*, p. 17, this issue has been framed by various courts and litigants either (a) as a form of the "control" exception in *Illinois Brick*, (b) as an "unnamed co-conspirator" exception, (c) as simply being outside the ambit of *Illinois Brick*, or (d) as a "vertical conspiracy" exception. For purposes of convenience Stewart and Smith use the Hospital's "vertical conspiracy" terminology throughout (Pet. 4).

remote horizontal conspiracy] and passing on, without on actual agreement, would establish a vertical conspiracy [or] whether such conspiracies are outside the rationale of *Illinois Brick*" (Pet., App. D, 25a). A number of decisions, including one cited by the Hospital and the decision in the court of appeals in this case, have arguably either: (i) reflected the holding or dictum that generally under the right circumstances of pleading and proof (upon the precise nature of which they do not all agree), there may be a "vertical conspiracy" exception to *Illinois Brick;* or (ii) left the question open.[5]

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[5] *Jewish Hospital Ass'n.* v. *Stewart Mechanical Enterprises, Inc.*, 628 F. 2d 971, 977 (6th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3496, (U. S. Dec. 26, 1980) (No. 80-1068); *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F. 2d 323, 327-28 n. 9 (9th Cir. 1980); *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F. 2d 478, 481 (7th Cir. 1980), *rev'g Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 460 F. Supp. 1151, 1158-60 (N.D. Ill. 1978); *In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1161-63 (5th Cir. 1979), *cert. denied*, 101 S.Ct. 281 (Oct. 14, 1980); *Abrams* v. *Interco, Inc.*, [1980-2] Trade Cases (CCH) ¶63,292, p. 75,552 (S.D.N.Y. Apr. 17, 1980); *Reiter* v. *Sonotone Corp.*, 486 F. Supp. 115, 119-21 (D. Minn. 1980); *Technical Learning Collective, Inc.* v. *Daimler-Benz AG.*, [1980-81] Trade Cases (CCH) ¶63,612, pp. 77,253-56 (D.Md. Aug. 28, 1980); *Vermont* v. *Densmore Brick Co.*, [1980-2] Trade Cases (CCH) ¶63,347, p. 75,778 (D.Vt. Apr. 10, 1980); *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091, 1103-04 (D.Md. 1979); *In re Cement and Concrete Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,069, p. 74,639 (D. Ariz. 1978); *In re Anthracite Coal Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,059, p. 74,587 (M.D. Pa. 1978); *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441, 443-44 (M.D. Fla. 1978); *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co.*, [1977-2] Trade Cases (CCH) ¶61,789, p. 73,245 (D. Ariz. 1977); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D. N.Y. 1973).

Whether these decisions express the concept as being outside the ambit of *Illinois Brick,* as a vertical conspiracy exception to *Illinois Brick,* as an unnamed co-conspirator exception, or as part of the recognized control exception, they all seem to agree that on proper pleadings and proof of an actual vertical conspiracy, there may be a circumstance under which the rationale of *Illinois Brick* does not apply. For this reason there is no burning disputed issue of law regarding the theoretical or practical efficacy of a vertical conspiracy exception to *Illinois Brick.*

Not one of these cases, however, does what the Hospital has in its second Question Presented asked this Court to do — allow a pleading of horizontal conspiracy to be converted into a pleading of vertical conspiracy merely by the addition of "unnamed co-conspirator" allegations which logically and on their face apply only to the horizontal conspiracy. In fact, as discussed below in part II, each of the four courts which has faced this argument, the Fifth, Sixth, and Ninth Circuits and the District of Arizona, has rejected the notion entirely.

II. The Court of Appeals Was Correct That This Is Merely a Case of Inadequate Pleading by the Hospital and That the "Vertical Conspiracy Issue" Is Not Presented.

Both the district court (Pet., App. A, 8a-9a) and the court of appeals (Pet., App. D, 24a-25a), 628 F. 2d at 977, declined to rule on whether there is a vertical conspiracy exception to *Illinois Brick.* This case did not present the issue because regardless of what facts

the Hospital might have presented in the case to support its theory (and it developed none), the Hospital did not plead a vertical conspiracy. The single case cited by the Hospital for its contention that the motion to consolidate "raised" the vertical conspiracy issue (Pet. 4) and that "the pleadings and the Motion to Consolidate covered the issue raised on appeal" (Pet. 6), holds just the opposite, and is in accord with every case on point not cited to the Court by the Hospital.[6]

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[6]The Hospital cites no authority for its novel position that when two actions not between the same parties are consolidated under Rule 42(a) of the Federal Rules of Civil Procedure, the parties to each action thereby become parties to the other. Prior to the adoption of Rule 42(a), this Court in *Johnson* v. *Manhattan Ry.*, 289 U. S. 479 (1933), held as follows regarding consolidation under the predecessor consolidation statute, 28 U.S.C. §734:

> consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.
>
> 289 U. S. at 496-97.

Since the adoption of Rule 42(a) these principles of discretion governing consolidation have remained constant, and the rule stated above remains the same. *E.g., Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 950 n. 6 (2d Cir.), *cert. denied*, 377 U. S. 934 (1964). Even in combination with the Hospital's other novel theories, the consolidation motion was inappropriate and would have been ineffective for the Hospital's purpose even if granted in the district court's discretion under Rule 42(a). *See also* 9 Wright & Miller, Federal Practice and Procedure: Civil §2382, p. 255; §2383, pp. 259-62 (1971 & Supp. 1979).

A. The Hospital's Authority.

The case upon which the Hospital inexplicably places great reliance, *Gas-A-Tron of Arizona, Inc. v. American Oil Co.*, [1977-2] Trade Cases (CCH) ¶61,789, p. 73,245 (D. Ariz. 1977), was decided December 7, 1977 during the pendency of this action in the district court, after *Illinois Brick* was decided and while the court had before it Stewart's and Smith's motion for summary judgment based on *Illinois Brick*. In *Gas-A-Tron* the district court outlined to plaintiffs' counsel everywhere the way around the obvious problems created by the application of *Illinois Brick* to pre-*Illinois Brick* complaints.

Inasmuch as theretofore there had been no need to consider the problems of passing on, except as they might have been anticipated as a result of the holding in *Hanover Shoe,* the strategy for antitrust plaintiffs in pending cases was to read into their pleadings and facts not only the two exceptions recognized in *Illinois Brick* but any other conceivable exception which they might invent. The plaintiffs in *Gas-A-Tron* were no different. They had filed a traditional horizontal conspiracy complaint alleging the existence of unnamed and unspecified co-conspirators. As in this case, the complaint was no doubt inspired by, if not copied from, the traditional form of horizontal price-fixing indictment used by the Antitrust Division.

Noting that the definition of a "co-conspirator" in the complaint could not fairly be read to include the middlemen, the court in *Gas-A-Tron* held that such

pleadings could not withstand summary judgment but denied the summary judgment motion on the condition that the plaintiff amend its complaint to conform to the discovery in the case and to show specific allegations of a vertical conspiracy. The court opined that if so amended, the complaint would not require the plaintiff to prove a pass-on theory, and under it the plaintiff would be allowed to prove only that the last price to it was the one fixed. [1977-2] Trade Cases (CCH) at 73,245. The court did not reach the issue of whether the middlemen conspirators would have to be named as parties in the case.

Gas-A-Tron is the only case cited by the Hospital with respect to the "vertical conspiracy issue", yet that decision totally undercuts the Hospital's precarious position. As set forth above in Part I, there are a number of other opinions of which this Court ought to be aware in considering the petition. In addition to the Sixth Circuit in this case, the Fifth, Seventh and Ninth Circuits have been faced with all or part of the issue and have written opinions on the subject. The decisions of these four courts present no conflict to this Court in respect of the record in this case. Each of the other three would have done exactly as the Sixth Circuit has done and would have declined, because of the state of the pleadings and the record, to rule on the existence or scope of a vertical conspiracy exception under the "facts" supposed by the Hospital.

B. The Fifth Circuit Approach.

In *In re Beef Industry Antitrust Litigation,* 600 F. 2d 1148 (5th Cir. 1979), *cert. denied,* 101 S. Ct. 281 (Oct. 14, 1980), the Fifth Circuit, the first court of appeals to address the issue, was presented with the argument that pleadings alleging a horizontal conspiracy among remote price fixers could fairly be read to encompass a vertical conspiracy with middlemen where the complaint also contained reference to the existence of unnamed and unspecified co-conspirators. As in *Gas-A-Tron,* there was nothing specific in the pleadings to show that these unnamed co-conspirators were other than horizontal competitors of the remote price-fixer defendants. The court of appeals noted that "many of the allegations strongly suggest that all the non-defendant co-conspirators are [remote price fixers]." 600 F. 2d at 1160 n. 15. The complaints did plead the existence of a pass-on through the normal operation of the market mechanism but did not plead a vertical conspiracy. 600 F. 2d at 1161. The Fifth Circuit considered the issues and held as follows:

1. The complaint contained "merely an allegation of passing-on, not of [vertical] conspiracy." *Id.*

2. Since (a) there was no prejudgment request for leave to amend the complaint after the decision in *Illinois Brick;* (b) the summary judgment motion which was made on July 17, 1977, eight days after the decision in *Illinois Brick,* was not ruled on until October 1977; and (c) the only request for leave to amend

the complaint was made after the judgment was entered on December 9, 1977; there was no abuse of discretion by the trial court in denying a motion to amend filed at that time. *Id.* at 1161-62.

3. Allegations of vertical conspiracy would not constitute allegations sufficient to raise the narrow "control" exception set forth in footnote 16 to *Illinois Brick*. *Id.* at 1162.

4. There is no exception to *Illinois Brick* for suits alleging vertical conspiracy when "the alleged co-conspirator middlemen are not named as parties defendant." *Id.* at 1163. This ruling is based upon the branch of *Illinois Brick* which sets up the indirect purchaser doctrine to avoid the risk of multiple, inconsistent liability.[7]

C. The Seventh Circuit Approach.

The next Court of Appeals to decide a case on this issue was the Seventh Circuit in *Fontana Aviation,*

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[7]Two district court cases have reached the same result on the basis of the holding in *In re Beef Antitrust Litigation* that the middlemen must be named parties to the litigation in order for any vertical conspiracy exception to apply. *Technical Learning Collective, Inc.* v. *Daimler-Benz AG.*, [1980-81] Trade Cases (CCH) ¶63,612, pp. 77,253-56 (D.Md. Aug. 28, 1980) (motion to dismiss granted where resale price maintenance alleged but middlemen not sued); *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091, 1103-04 (D.Md. 1979) (motion for summary judgment granted where vertical price-fixing conspiracy alleged but middlemen not sued). The Fifth Circuit's opinion also *sub silentio* overruled the decision in *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441, 443-44 (M.D. Fla. 1978), to the extent it may have sanctioned the use of a vertical conspiracy exception without the naming of the middlemen as defendants.

Inc. v. *Cessna Aircraft Co.*, 617 F. 2d 478 (7th Cir. 1980). That case involved claims of damage to an indirect purchaser as a result of vertical price-fixing by a remote manufacturer and its independent distributors and monopoly by the remote manufacturer through the use of its distributors. The trial court applied *Illinois Brick* and granted defendant's motion for summary judgment as to both types of damage claims. *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 460 F. Supp, 1151, 1158-60 (N.D. Ill. 1978). The Seventh Circuit reversed and reinstated the claims noting with respect to the price-fixing claims that the amended complaint specifically alleged that the manufacturer and its independent distributor had conspired vertically to injure the remote purchaser. 617 F. 2d at 479. The court so decided even though the manufacturer was made a defendant and the independent distributor middleman was not. *Id.* at 481[8].

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[8]The conclusion reached in *Fontana* — that there may be a vertical conspiracy exception to *Illinois Brick* where the vertical conspiracy is actually pleaded and even though the middlemen are not sued — has been reached by five different district courts. *Abrams* v. *Interco, Inc.*, [1980-2] Trade Cases (CCH) ¶63,292, p. 75,552 (S.D. N.Y. Apr. 17, 1980) (motion to dismiss denied where resale price maintenance alleged); *Reiter* v. *Sonotone Corp.*, 486 F. Supp. 115, 119-21 (D. Minn. 1980) (summary judgment denied where resale price maintenance alleged); *Vermont* v. *Densmore Brick Co.*, [1980-2] Trade Cases (CCH) ¶63,347, p. 75,778 (D. Vt. Apr. 10, 1980) (summary judgment denied where resale price maintenance alleged); *In re Anthracite Coal Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,059, p. 74,587 (M.D. Pa. 1978) (numerosity of alleged class of plaintiff indirect purchasers not determinable where it is not known whether members of class

(Footnote continued on next page)

D. The Ninth Circuit Approach.

Next the Ninth Circuit confronted the issue in *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F. 2d 323 (9th Cir. 1980). Under *Illinois Brick* the court of appeals affirmed a summary judgment in favor of paper manufacturers, alleged to be horizontal price-fixing conspirators, against the remote purchaser of paper products who bought from middlemen independent wholesalers. The indirect purchaser raised in the court of appeals the theory that "the wholesalers from whom it purchased were the unnamed co-conspirators referred to in the complaint." *Id.* at 327-28 n. 9.

The court pointed out that the plaintiff had opposed summary judgment at the trial court level by merely noting that based on deposition testimony the wholesalers might have been involved and that they

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(Footnote continued from preceding page)
will allege vertical price-fixing conspiracy) (dictum); *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co.*, [1977-2] Trade Cases (CCH) ¶61,789, p. 73,245 (D. Ariz. 1977) (summary judgment denied where amended complaint would allege vertical price-fixing conspiracy); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D. N.Y. 1973) (before *Illinois Brick*, intervention of consumers as plaintiffs denied where proposed intervening complaint did not allege vertical conspiracy between existing plaintiff retailers and existing defendant manufacturer). The pre-trial order reported in *In re Cement and Concrete Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,069, p. 74,639 (D. Ariz. 1978), denies summary judgment where there is a question of fact whether middlemen were part of a conspiracy but does not describe the pleadings. The same court, however, had recently decided *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co., supra*, on the theory that the vertical conspiracy must be specifically alleged.

should be classified as "suppliers of paper" under the co-conspirator pleading in the horizontal conspiracy complaint against the remote manufacturers. This is precisely the same as the Hospital's argument that those "engaged in the business of providing mechanical contracting supplies and services" (Complaint, p. 2; Pet. 6) should be read to include general contractors through which mechanical work was bid and the cost passed on to the Hospital.

The Ninth Circuit properly held that a vertical conspiracy allegation was not before the trial court on these pleadings. The Ninth Circuit also noted, as an independent ground for summary judgment, that portion of the decision of the Fifth Circuit in *In re Beef Antitrust Litigation* holding that even when a vertical conspiracy is pleaded to avoid the problems of *Illinois Brick,* the intermediaries must also be named as defendants, not merely as unnamed co-conspirators. *Id.*

E. The Sixth Circuit Approach.

The most recent of the court of appeals decisions on this issue is the one now before this Court. In this case the court of appeals reviewed a record devoid of any pleading of vertical conspiracy or any motion, even a post-judgment motion, for an amendment of the pleadings to reflect a vertical conspiracy. Even after a motion for summary judgment under *Illinois Brick,* even after the decision in *Gas-A-Tron* cited by the Hospital in the trial court, and even after the denial of a motion to consolidate this horizontal case with the horizontal case against the general contractor middle-

men, the Hospital decided to ride out the motion for summary judgment under *Illinois Brick* on the pleadings as they stood prior to *Illinois Brick*.

The Hospital stayed with its innuendo that because only two mechanical contractors bid even though nine were "approved" and that because these bids were allegedly rigged, there *may* have been a vertical conspiracy *if* the middlemen knew of the alleged actions of the mechanicals. Discovery in the case against the general contractors yielded nothing to support this, and the Hospital did not seek to amend its pleadings to reflect its bare supposition. The issue which the Hospital wanted to present, but upon which it had no information and no basis for a pleading, was stated by the Sixth Circuit as follows:

> The Hospital argues that any general contractor who knew or should have known the bids were rigged and who incorporated the rigged bids into its own bid calculations became a party to the conspiracy. Under the Hospital's theory, such a general contractor would be jointly and severally liable for the full amount of the overcharge, and the Hospital would not have to assert a pass-on theory to prove its damages.
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> 628 F. 2d at 977.

Under the circumstances set forth above, the Sixth Circuit properly disposed of the Hospital's appeal on this point as follows:

> The problem with this argument is that the Hospital has never pleaded the existence of a vertical conspiracy nor alleged facts sufficient to sustain

such an allegation. . . . The Hospital has never alleged that any of the general contractors knew the subcontractors' bids were rigged nor indicated what facts would have put the general contractors on notice of the defendants' illegal activities. In the absence of such allegations, the Hospital's vertical conspiracy argument impresses the court as a transparent attempt to evade the rule of *Illinois Brick*. *Cf. In re Beef Industry Antitrust Litigation, supra,* 600 F. 2d at 1161-63 (rejecting a similar belated attempt to argue the existence of a vertical conspiracy). Under the circumstances, we need not decide whether proof of knowledge and passing on, without actual agreement, would establish a vertical conspiracy nor whether such conspiracies are outside the rationale of *Illinois Brick*. *See Id.*

628 F. 2d at 977.

F. Reconciliation of the Authorities.

The Sixth Circuit has not gone as far as the Fifth and Ninth Circuits did in requiring actual joinder of middlemen co-conspirators as defendants when an indirect purchaser desires to raise a vertical conspiracy exception,[9] but has agreed with the Fifth, Seventh, and

[9]The Sixth Circuit's opinion does not even raise a question as to whether there is an irreconcilable conflict between the rule of the Fifth and Ninth Circuits that a plaintiff must sue all joint tortfeasors in a vertical scheme to avoid *Illinois Brick*, and the rule for which the Hospital cites *Leh* v. *General Petroleum Corp.*, 382 U. S. 54, 63-64 (1965), that generally all joint tortfeasors need not be sued. The Hospital's reference to the latter rule (Pet. 8) is inapposite because the court of appeals did not hold that the Hospital must have sued the middlemen. In any event, these two rules surely could co-exist.

Ninth Circuits that a plaintiff must at least plead the existence of a vertical conspiracy. Moreover, the Sixth Circuit has agreed with the Fifth and the Ninth Circuits and with the District of Arizona in *Gas-A-Tron,* relied upon by the Hospital, that the pleading of a horizontal conspiracy including a paragraph alleging the existence of unknown co-conspirators (at least where the co-conspirators are not specifically alleged to have been the middlemen) will not constitute a vertical conspiracy pleading for the purposes of raising the issue and avoiding the indirect purchaser doctrine.[10]

In the ordinary summary judgment case the issue is the existence or nonexistence of genuine issues of material fact. It is the option of the party opposing the motion to come forward with facts tending to show the existence of an issue of material fact or to present affidavits pursuant to Rule 56(f) of the Federal Rules of Civil Procedure to show why it is then unable to present such facts in affidavit or other suitable form. In this case the Hospital did not even reach that stage —its case contained a much more basic flaw. While it tries in this Court as it tried in the Sixth Circuit to rely upon hints and innuendo of a vertical conspiracy, it never found facts to support a pleading and con-

[10]These holdings are completely consistent with the requirement that a conspiracy be pleaded at least as required under Rule 8 of the Federal Rules of Civil Procedure and perhaps even with the specificity required under Rule 9(b). *See generally,* 5 Wright & Miller, Federal Practice and Procedure: Civil §1233 (1969 & Supp. 1979).

sequently never felt confident enough even to seek the right to amend and plead the elements and facts of such a conspiracy. The court of appeals was absolutely correct in refusing to reach the issue of whether, in a well-pleaded case, there may be a "vertical conspiracy" exception to *Illinois Brick*.

For this reason it is absurd to say, as the Hospital has, that "the issue raised by this Petition . . . is important to the development in the law of the private enforcement of anti-trust claims and a necessary implementation of the *Illinois Brick* decision" (Pet. 7). Similarly, it is obvious that there is no conflict between the decision of the Sixth Circuit and the decision of any other court of appeals on the vertical conspiracy exception which the Hospital tries to employ. Neither is there any departure in the Sixth Circuit's opinion from the accepted and usual course of judicial proceedings.

Finally, even if this case were remanded, the court of appeals would have another ground upon which to deny relief to the Hospital. The complaint was filed approximately two years after the end of the four-year limitations period of 15 U.S.C. §15b, as extended by the 1972 indictments and civil suit until September 1974. (Brief for Defendants-Appellees, Cross-Appellants, pp. 15-21, 37-47, filed October 23, 1978, in the court of appeals). The material facts are already in the record and this issue has been briefed to the Sixth Circuit on Stewart's and Smith's cross-appeal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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